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| 10/065,546 | 10/29/2002 | Steven Neiman | 36287-03400 | 7678 |
| 27171 7590 08/28/2007 MILBANK, TWEED, HADLEY & MCCLOY 1 CHASE MANHATTAN PLAZA NEW YORK, NY 10005-1413 | | | EXAMINER WAI, ERIC CHARLES | |
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Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary

Application No.

10/065,546

Applicant(s)

NEIMAN ET AL.

Examiner

Eric C. Wai

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 22 June 2007.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 2-44, 46-62 and 64-77 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 2-44, 46-62 and 64-77 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 29 October 2002 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. _____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- ☒ Notice of References Cited (PTO-892)
- ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- ☒ Information Disclosure Statement(s) (PTO/SB/08)
Paper No(s)/Mail Date 06/25/2007.
- ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____
- ☐ Notice of Informal Patent Application
- ☐ Other: _____

DETAILED ACTION

1. Claims 2-44, 46-62, and 64-77 are presented for examination. Claim 1, 45 and 63 are cancelled in amendment dated 6/22/2007.

Claim Objections

2. Claim 50 is objected to because it depends off cancelled claim 45. For purposes of examination, claim 50 will be interpreted to depend off claim 74. Appropriate correction is required.

Claim Rejections - 35 USC § 103

3. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

4. Claims 2-3, 22, 26-28, 35-36, 38-43, 44, 46-47, 55-56, 60-62, 70-71, and 73-77 are rejected under 35 U.S.C. 103(a) as being unpatentable over Rajkumar (US PG Pub No. US 2003/0061260 A1) in view of Thomas et al. (US Pat No. 6,301,574 hereinafter Thomas).
5. Thomas was disclosed on IDS dated 1/12/2004.

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6. Regarding claim 39, Rajkumar discloses a method, comprising:

receiving one or more reservations for use of at least a first subset of a plurality of computing resources of a distributed computing system, wherein each of said one or more reservations specifies a period of time for use of said computing resources (abstract lines 4-5 and 8-9);

allocating said first subset of said computing resources for use in accordance with said one or more reservations (abstract lines 14-17, wherein the "reservation activities" run at a higher priority);

receiving one or more requests for use of at least a second subset of said plurality of computing resources of said distributed computing system, wherein each of said one or more requests specifies a period of time for use of said computing resources (abstract lines 9-12 and [0025]);

determining whether a sufficient amount of one or more unallocated computing resources are available, wherein said one or more unallocated computing resources comprises said computing resources of said distributed computing system that are not allocated in accordance with said one or more reservations ([0023] lines 8-9);

responsive to said sufficient amount of said unallocated computing resources being available, allocating said unallocated computing resources in accordance with said one or more requests ([0023] lines 8-9); and

responsive to said sufficient amount of said unallocated computing resources not being available, allocating said unallocated computing resources in accordance with an allocation criteria ([0024] lines 1-7).

7. While, Rajkumar does not explicitly teach the step of determining whether a sufficient amount of unallocated computing resources are available to fulfill all of said one or more requests, it would have been obvious to one of ordinary skill in the art at the time of the invention to have included this limitation. Rajkumar's method has the same end result of allocating resources to satisfy the requesting tasks as much as possible. Furthermore, Rajkumar does not explicitly teach that the method is to be used on a distributed computer system. It would have been obvious to one of ordinary skill in the art at the time of the invention to include a distributed computer in Rajkumar's invention. One would be motivated by the desire to increase the throughput and scalability of Rajkumar's invention.

8. Rajkumar does not teach that said one or more requests each comprise a bid indication, and wherein said allocation criteria considers said bid indication of each said request by fulfilling said requests beginning with said request comprising a highest bid indication and continuing in descending order of requests comprising said bid indications of lesser values until all of said unallocated resources have been allocated.

9. Thomas describes a method of bidding and contrasting the bid information in order to improve pricing due to substantial competition (col 1 lines 52-55 and col 2 lines 22-33).

10. It would have been obvious to one of ordinary skill in the art at the time of the invention to include a bid indication with each request and allocating resources accordingly. One would be motivated by the desire to increase revenue as a result of competition as described by Thomas.

11. Regarding claim 2, Rajkumar teaches modifying an amount of said plurality of computing resources of said distributed computing system based on consideration of said one or more reservations ([0024] lines 3-7).

12. Regarding claim 3, Rajkumar and Thomas do not explicitly teach adding a computing resource while said distributed computing system is in use.

13. It would have been obvious to one of ordinary skill in the art at the time of the invention to include adding a computing resource while the system is in use. One would be motivated by the desire to ensure that additional resources can still be allocated even if all the currently available resources are saturated.

14. Regarding claim 22, Rajkumar teaches that said plurality of computing resources comprises a processing device ([0048] line 2).

15. Regarding claim 26, Rajkumar and Thomas do not teach charging a user for canceling a reservation.

16. However it would be obvious to one of ordinary skill in the art at the time of the invention to include charging a user for the cancellation. Official notice is made that it is well known to charge a user for canceling a reservation. One would be motivated by the desire to penalize users for the cancellation of a resource because of the possibility that

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the resource would remain unutilized and no income was being generated from the idle resource.

17. Regarding claim 27, Rajkumar teaches that said plurality of computing resources comprises a memory device ([0048] line 5).

18. Regarding claim 28, Rajkumar teaches that said plurality of computing resources further comprises a processing device ([0048] line 2).

19. Regarding claim 35, Rajkumar teaches that one or more requests each comprise a priority indication, and wherein said allocation criteria considers said priority indication of each said request (abstract lines 9-12).

20. Regarding claim 36, Rajkumar teach that said allocation criteria comprises a calculation of a weighted average based at least in part on said priority indications ([0020] lines 16-18).

21. Regarding claim 38, Rajkumar teaches that the allocation criteria comprises an equal division of said unallocated computing resources between a plurality of users that have made a request ([0023-0024], wherein fixed priority activities having the same priority would be given an equal division of the resources).

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22. Regarding claim 41, Rajkumar teaches that the unallocated computing resources are allocated dynamically ([0051] lines 2-3).

23. Regarding claim 42, Rajkumar and Thomas do not explicitly teach re-allocating said unallocated computing resources dynamically.

24. However it would have been obvious to one of ordinary skill in the art at the time of the invention to include reallocation. While not mentioned explicitly by Rajkumar, such a process is implied since Rajkumar's system is intended to continuously allocate resources as they are freed and new tasks come in.

25. Regarding claim 43, Rajkumar teaches that the unallocated computing resources are allocated in real time in response to receiving said one or more requests (claim 2).

26. Regarding claim 44, it is the system means claim of claim 39 above. Therefore, it is rejected for the same reasons as claim 39 above.

27. Regarding claim 46, Rajkumar teaches that said computing device comprises a server ([0048]).

28. Regarding claim 47, Rajkumar and Thomas do not teach that said computing device comprises at least two servers, wherein each server is in a different geographic location.

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29. However, it would have been obvious to one of ordinary skill in the art at the time of the invention to include two servers in separate geographic locations. One would be motivated by the desire to protect against system failure by using load balancing and redundancy.

30. Regarding claim 55, Rajkumar teaches that a persistent data storage queue in communication with said computing resources, and wherein a minimum availability of said distributed computing system is defined by an availability of said persistent data storage queue ([0007]).

31. Regarding claims 56, 60-62, 70-71, 73, and 76-77, they are the system claims of claims 22, 26-28, 35-36, 38, 41, and 43 above. Therefore, they are rejected for the same reasons as claims 22, 26-28, 35-36, 38, 41, and 43.

32. Claims 4-21, 29-34, 37, 48-54, 64-69, and 72 are rejected under 35 U.S.C. 103(a) as being unpatentable over Rajkumar (US PG Pub No. US 2003/0061260 A1) and Thomas et al. (US Pat No. 6,301,574) in view of Schweitzer et al. (US Pat No. 6,418,467 hereinafter Schweitzer).

33. Schweitzer was disclosed on IDS dated 1/12/2004.

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34. Regarding claim 4, Rajkumar and Thomas do not teach monitoring a usage level for at least a portion of said computing resources of said distributed computing system.

35. Schweitzer describes a method for network accounting and billing based on usage data (abstract and col 1 lines 56-67 to col 2 lines 1-7). It would have been obvious to one of ordinary skill in the art at the time of the invention to have included monitoring a usage level in order to correctly bill customers.

36. Regarding claim 5, Schweitzer teaches providing data descriptive of said usage level (col 2 lines 19-27).

37. Regarding claim 6, Schweitzer teaches providing data descriptive of said usage level is performed in real time (col 3 lines 65-67).

38. Regarding claim 7, Schweitzer teaches using a graphical user interface to display said data descriptive of said usage level (col 4 lines 8-9 and 17-18).

39. Regarding claim 8, Schweitzer teaches that said usage level comprises a present usage of said plurality of computing devices (col 4 lines 1-2).

40. Regarding claim 9, Schweitzer teaches that said usage level comprises a historical usage of said plurality of computing devices (col 3 lines 43-49).

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41. Regarding claims 10-15, Schweitzer does not teach monitoring an allocation of the computer resources. However, it would have been obvious to one of ordinary skill in the art at the time of the invention to monitor the allocation of resources for purposes of billing. Since allocation is equivalent to usage, claims 10-15 are rejected for the same reasons as claims 4-9.

42. Regarding claims 16-21, Schweitzer does not teach monitoring an inventory of the computer resources. However, it would have been obvious to one of ordinary skill in the art at the time of the invention to monitor the inventory of resources for purposes of billing. Since inventory is equivalent to allocation, claims 16-21 are rejected for the same reasons as claims 10-15.

43. Regarding claim 29, Rajkumar and Thomas do not teach billing a user of said computing resources.

44. Schweitzer describes a method for network accounting and billing (abstract and col 1 lines 56-67 to col 2 lines 1-7). It would have been obvious to one of ordinary skill in the art at the time of the invention to have included billing a user for using computer resources in order to gain a profit.

45. Regarding claim 30, Schweitzer teaches that billing comprises determining whether a first price or a second price is to be billed (col 3 lines 24-25, "set the right price").

46. Regarding claim 31, Schweitzer does not explicitly teach that the first price comprises a peak price.

47. However it would have been obvious to one of ordinary skill in the art to include a peak price to be charged during high utilization. One would be motivated by the desire to ensure a higher return of profit when multiple users are vying for resources.

48. Regarding claims 32-33, Schweitzer does not explicitly teach that said first price comprises an off-peak price or that said second price comprises a peak price.

49. However it would have been obvious to one of ordinary skill in the art to include a peak price to be charged during high utilization and an off-peak price to be charged during low utilization. One would be motivated by the desire to ensure a higher return of profit when multiple users are vying for resources.

50. Regarding claim 34, Schweitzer does not explicitly teach that said first price is billed for said computing resources allocated in response to said reservation and said second price is billed for computing resources allocated in response to said request, wherein said first price is higher than said second price.

51. However it would have been obvious to one of ordinary skill in the art to bill differently for a reservation and a request. Since reservations guarantee the allocation of a resource, one would be motivated by the desire to turn a higher profit by charging a higher premium.

52. Regarding claim 37, Rajkumar, Thomas, and Schweitzer do not teach billing a user of said computing resources such that a cost varies in accordance with said priority indication.

53. However it would have been obvious to one of ordinary skill in the art at the time of the invention to include doing so since a higher priority indication results in a higher guarantee of resource allocation. Thus, one would be motivated by the to turn a higher profit by charging a higher premium for such a guarantee.

54. Regarding claims 48-53, they are the system claims of claims 6-7, 12-13, and 18-19 above. Therefore, they are rejected for the same reasons as claims 6-7, 12-13, and 18-19.

55. Regarding claim 54, Schweitzer teaches that said computing device is further configured to generate a billing record based on a usage level of said plurality of computing resource (col 3 lines 32-33).

56. Regarding claims 64-69, and 72, they are the system claims of claims 29-34, and 37 above. Therefore, they are rejected for the same reasons as claims 29-34, and 37.

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57. Claims 23-25, and 57-59 are rejected under 35 U.S.C. 103(a) as being unpatentable over Rajkumar (US PG Pub No. US 2003/0061260 A1) and Thomas et al. (US Pat No. 6,301,574) in view of Ahamed et al. (US Pat No. 5,978,831 hereinafter Ahamed),

58. Regarding claim 23, Rajkumar and Thomas do not teach that said plurality of computing resources comprises: a first type of processing device having a first processing capability; and a second type of processing device having a second processing capability, wherein said first and second processing capabilities are different.

59. Ahamed teaches mixing and matching processors of different speeds in order to create a system with reduced cost (col.3 lines 3-21). It would have been obvious to one of ordinary skill in the art at the time of the invention to have included a distributed computer system composed of processors of differing processing capabilities in order to reduce system costs.

60. Regarding claims 24-25, Ahamed teaches that each of said one or more reservations and requests comprises an expression of said first and second types of processing device in a normalized unit of processing capability (col.12 lines 25-43).

61. Regarding claims 58-59, they are the system claims of claims 23-25 above. Therefore, they are rejected for the same reasons as claims 23-25.

Response to Arguments

62. Applicant's arguments filed 06/22/2007 have been fully considered but they are not persuasive.

63. Applicant's argue:

a. Rajkumar and Thomas, alone or in combination fail to disclose or suggest at least *receiving one or more reservations for use of at least a first subset of a plurality of computing resources of a distributed computing system wherein said one or more requests each comprise a bid indication and wherein said allocation criteria considers said bid indication of each said request*, as recited in claim 39.

b. Even if some combination of features from Rajkumar and Thomas disclosed all aspects of the method of claim 39, ... Applicants respectfully submit that a person of ordinary skill in the art would not have combined Rajkumar (a patent application concerning resource management in a data processing system) and Thomas (a patent about facilitating communications between contractors and outsourcing companies) in the manner the Examiner suggest to achieve the method of claim 39.

64. Regarding a). Thomas was cited to teach that the concept of bidding would have been well known to one of ordinary skill in the art at the time of the invention. Bidding, as taught by Thomas, allows a system to accept bid information from contractors, place

the bid information in a report for sending to the company providing contract (col 2 lines 26-33).

65. While applicant is correct in stating that Thomas does not explicitly teach "submitting a bid along with a request for allocation of computing resources of a distributed computing system", Examiner asserts that one of ordinary skill would have known to make the appropriate steps to implement the concepts of bidding. For instance, submitting a bid along with the request for allocation of computing resources is inherently necessary since some bid must be communicated along with the resource that is being sought.

66. Regarding b). Thomas was cited to teach that the concept of bidding would have been well known to one of ordinary skill in the art at the time of the invention. Applicant asserts that Thomas is not in the same field of endeavor as Rajkumar; however, this does not imply that the concept of resource bidding would have been unknown to one of ordinary skill.

67. A cursory search of the prior art reveals multiple references pertinent to the same field of endeavor as Rajkumar. Kimbrel et al. (US Pat No. 6,587,865) teaches a system and method that accepts bids for unutilized resources and selects the highest bid for that resource. Moody et al (US Pat No. 6,842,899 and 6,859,927) teach using agents for bidding of resources in a distributed system.

Conclusion

68. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

69. A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the mailing date of this final action.

70. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Eric C. Wai whose telephone number is 571-270-1012. The examiner can normally be reached on Mon-Thurs, 9am-5pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Meng - Ai An can be reached on 571-272-3756. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

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